he could not be employed. Yet this is called a threat. This is ridiculous.

It will be noted that on page 4 of the Board's Brief is set out an isolated and erroneous statement purported to be by Charles Smock. In the first place, we call attention to the fact that on the night of August 5, 1968 Mr. Smock, as an employee of the meat department was invited and attended the unionization meeting along with four other employees, which was held with Mr. Wolff, the union business agent. They hoped to have Mr. Smock go along with them and to sign a union authorization card. He attended the meeting but didn't go along with the union idea (A. 47). On the afternoon of August 6 when Mr. Marshall called in Marjorie Smith Gibbons, Gary Stanley, and Donald Harker to inquire as to their desires, Mr. Smock was present and took a small part in the conversation. In their Brief, page 4, it is erroneously stated that Smock said he didn't like the idea of the union at all and he didn't like to go through a third party, and inquired whether they would be satisfied if the company could come up with something similar, a contract proposal that they could discuss without going through the third party, the union. That statement in their Brief was obviously copied from the decisions of the Trial Examiner and of the Board. The record shows clearly that Mr. Stanley, whose testimony was used, and quoted, was not sure as to just what was said and by whom.

It will be noted that this conversation was between Marjorie Smith Gibbons and Smock. Hers is the obviously correct statement as to what occurred and what was said, yet the Board's Brief herein, the Board's Decision, and the Trial Examiner's Decision ignore completely her statement as to her conversation with Smock. This shows the deliberate distortion of the evidence and of the record. We have set out beginning on page 18 of our

Petition this conversation. Note that Marjorie Gibbons testified that "I said we wanted a contract, union contract, and Charles Smock said, 'Would you be satisfied with a company contract?' I told him, no." Yet, Gary Stanley's uncertain version is the one picked out and used in the Board's Brief. We have discussed this matter on page 20 of our Petition. Note specifically that in reference to this alleged statement by Smock, Mr. Stanley testified, "Well, I couldn't remember all of it exactly in so many words, but it was either Adam (Marshall) or Charles Smock, ..." We emphasize that Stanley said, "I can't remember all of it exactly in so many words," and he wasn't sure whether Marshall or Smock made the statement (A. p. 102). Yet his indefinite version was selected to the exclusion of Marjorie Gibbons' positive testimony on her specific and personal conversation on the subject. This clearly shows the distortion and the failure to consider the record as a whole. Why was Marjorie Gibbons' testimony ignored? Even Stanley's version is not a threat.

It is further complained on page 4 of their Brief that Mr. Marshall on this occasion said that if they joined the union all he would say would be good morning when they came to work in the morning and that all of the rest of the talking would have to be done through the third party, the union. What is wrong with that statement? It is the truth. It was merely calling attention to the fact that if the union became the bargaining representative for them he could not discuss or negotiate working situations with them. We submit again that it is ridiculous to pick out of context and out of the true purport of the whole record a statement like this and call it a threat.

They again stated that Mr. Marshall said that if they wanted a promotion or transfer to another store, it couldn't happen because there was no union in the meat

department of any of the other stores. This is a statement of fact. Their union affiliation would not apply anywhere but in this meat department of six employees. This was most certainly not a threat.

On page 5 of the Board's Brief, it is stated that employee Charles Baker was asked what his gripe was, and that Baker replied that Marshall "promised him a raise previous to my coming to the meat department", and he had not gotten it yet. Baker in his testimony (as is pointed out in our Petition, beginning on page 31), apparently was not concerned with the question of job security. He wanted a raise that had been promised him approximately eight months before. It will be noted that his testimony shows without question that he was to be transferred from the grocery department to the meat department which occurred in January, 1969. He was complaining to Clemons on August 8 because he had not gotten the raise. We respectfully refer the Court to the statement of that testimony in our Petition beginning on page 31. That wage problem was discussed considerably, and it developed that Mr. Marshall had not given the raise earlier because of the pending union situation. He thought that nothing could be given or done while that was pending, which generally is the case. It developed that he didn't know that if it had been definitely promised prior to the union organizational program, that it could be paid. When informed that he was mistaken and that it could be paid, he paid it. Surely this cannot be distorted into an unfair labor practice and a bribe. Baker was paid the meat journeyman's rate which he had earned from January 1969 to the fall of 1969, which was $3.30 per hour. Yet this is grossly distorted, and it is stated that it was a bribe to get Baker and also Joe Harker to testify for Hy-Vee. There is absolutely no basis for this assertion. Neither is it claimed nor is any reference made

to any testimony by Baker or Joe Harker that was untrue or manufactured. This alone shows the desperation of our opposition.

It is next stated on page 5 of their Brief that Donald Harker, 17 years of age and an apprentice in the meat department, was talked to by both Mr. Marshall and Mr. Clemons. They state he was asked if he planned to stay in the meat department, and he stated that he did. Mr. Marshall then told him, which is the truth, that the union wouldn't help him in anything but the meat department. The union would be limited to this small department and there is a limited number of jobs there. As stated elsewhere, there is no union in any other Hy-Vee store. It is stated that Mr. Clemons merely asked Don Harker if he thought he could get along with the union, and he thought he could. Mr. Marshall then said that they had been friends and he figured that he would come to him when he needed help. There is no promise or threat in that statement. It is next stated at the bottom of page 5 that Marshall on the morning of August 9 "again elicited Harker's reasons for joining the union." This is another gross error. Marshall did not have any such conversation with Donald Harker. It was actually with Joe Harker, an older brother who was then a full-fledged meat cutter. It was a part of a conversation relating to promotions and the fact that in the meat department promotions were limited, there being only that of supervisor of the department above Joe Harker's current grade of meat cutter. What harm is there in informing Joe Harker of what the situation would be with the proposed union contract—and with the seniority therein provided. Again this is isolated and disconnected from the context.

On page 6 of their Brief it is stated that Clemons on August 12th or 13th had a conversation with employee Baker. The comment is that the conversation "paralleled"

the one previously had, which was about his promised wage increase. Surely this cannot be called a threat or a promise. See our Petition beginning at bottom of page 31.

Also on page 6, it is stated that Clemons asked Marjorie Smith (Gibbons) whether she had changed her mind, and warned her that it wouldn't do her any good, and that she wouldn't get anything out of it. Remember she was a meat wrapper, and there was no chance for her to be promoted to the job of meat cutter, because of the nature of her work. He was merely elaborating on what had previously been discussed, and it was not a threat. He had already told her as is pointed out in our Petition beginning with page 18, that they had made an error in not talking with them before, and that "their face was red because of their overlooking the situation." It will be noted that Marjorie Smith Gibbons testified that:

> "Q. He didn't tell you that you had to get out of the union?"
>
> "A. No, sir, he never told me I had to do anything."
>
> "Q. Wasn't his conversation along the line that you could do what you pleased, but he couldn't understand why?"
>
> "A. No, sir, it wasn't even discussed that deeply as to the union. Most of the conversation was that they were embarrassed, their face was red, they had let me down, why didn't I come to them first" (A. 130).

Thus the context throws an entirely different light upon the conversation.

It is next stated on page 6 that Clemons said to Stanley in discussing union negotiations, that they would finally get a contract but that it may take six months or a year. That is a statement which is purely an estimate and an opinion as to how long negotiations might require (A. 104). Surely this cannot be misconstrued into a threat of any

kind. It is merely the expression of an opinion in the course of a conversation.

Again it will be noted (A. 103) that Stanley simply stated in answer to questions by Counsel for the Board whether Clemons said anything pertaining to the union, and he answered "he just asked me to search my soul and think it over. I had thought it over, and I said I was for the union." Note that Stanley did not cancel his authorization card, and whatever was said to him had no effect. It can be stated also that Stanley and Marjorie Gibbons are still employed in the meat department at this time.

On page 6 of the Board's Brief at the bottom of the page, it is stated that Joe Harker and Charles Baker were given wage increases a few days after the Complaint in this case was issued. It is next stated that they were given higher increases than they had been given previously. It is also stated that both men had withdrawn their union authorizations. They failed to state that the withdrawal and cancellation of their union authorizations was on the 13th and 14th of August, and that the Complaint was issued October 15 to counsel. These raises were given in the latter part of October, and the Board deduces that they were given to influence their testimony. A reading of the testimony of both Joe Harker and Charles Baker shows clearly that both of these men were ordinary stock clerks in the grocery department prior to their transfer to the meat department. Their duties in the grocery department were not skilled work and they were given periodic smaller raises. When they were transferred to the meat department to learn and to become meat cutters, a specialized classification, they were told in December, 1967, long before the union activities, that they would be given substantial raises in the fall of 1968. That raise was in connection with their learning the meat cutter's trade, and was to be given

after they had worked at that trade for approximately nine months. The meat cutter's classification rate was $3.00 per hour, and these men were raised to that classification rate not in August or September, but in the latter part of October because of the misunderstanding by store manager Marshall that he could not give any raises while the unionization program was on. We have set this matter out in our Petition (Petition pp. 23, 31), but because of the limited brief statement and inference in the Board's Brief, we felt that it was necessary to reiterate in this reply the background reasons shown by the Record. It will be remembered that, when it was explained to Mr. Marshall, and by Mr. Wolff to Mr. Baker, that any raise promised prior to the union activity could be given. Mr. Marshall paid the previously promised wage increase. See our statement on this subject in our Petition at the bottom of page 50. Therefore, it is wild speculation and the grabbing for straws to make a case, for Counsel for the Board to try to manufacture an offense out of these facts and circumstances. It is ridiculous.

On page 7, it is next stated that Donald Harker testified that two weeks before the November 19, 1968 hearing, Mr. Marshall said to him that he would like to have one of them to stand up in the trial and ask for an election. This is claimed to be an attempt to influence testimony. This is a very fuzzy situation, if it occurred. Note that the record shows that there was already pending in the office of the Regional Director of the Board, a petition for an election filed by the company. There would be no reason for Mr. Marshall to make any such request to Donald Harker because the Petition was already pending. In any event, assuming that it was said, it does not and is not shown to have affected or influenced Donald Harker's testimony. This again is a strained attempt to make something out of nothing.

The Board's Brief on page 7 in summary refers to its preceding statement of the evidence as being the basis for the charge of unfair labor practices herein. We submit that the distortions and misstatements of the true evidence is so glaring that this Court should not hesitate to so find.

It is next stated that the Board found that the union had a majority of the employees through union authorization cards, and that the company's unfair labor practices had dissipated that majority status, and that Petitioner thereby violated the law. We submit that a careful reading and analysis of the whole record shows clearly that there was no unfair labor practice of any kind committed. All that Mr. Marshall and Mr. Clemons did was to explain to the employees their misunderstanding of their status, and that as long as they continued to do good work there was no danger of any of them losing their jobs. Because of the disturbances in the store by reason of a long and extensive general remodeling and rebuilding of the store over a period of several months, and the discharge of a couple of employees in the grocery department, these meat department employees were disturbed and impulsively assumed that because of the extended disturbances due to the remodeling and so forth in the store they needed a union to protect their jobs. All that Mr. Marshall and Mr. Clemons did was to tell them that their imaginings and fears were wrong. They were also told as we have specifically pointed out in our Petition, that they had a right to have the union represent them if they wanted to, but since they were mistaken in their reason, therefor, to think it over and be sure this is what they wanted to do. That is not an unfair labor practice act. The Board as constituted at that time was prone to find employers guilty of unfair labor practices upon the slightest pretext. This is one of those cases.

At the bottom of page 7 of the Board's Brief it is stated that the Court of Appeals states that it has carefully canvassed the whole record and are left with the firm conviction that the Board's findings are supported by substantial evidence. We submit that this is an abstract statement in a general Per Curiam Decision, and that a thorough reading of the record and of the testimony shows that there was no violation of the law by the Petitioner.

We submit that the findings of fact of the National Labor Relations Board and the Circuit Court of Appeals are not supported by substantial evidence on the record considered as a whole, and, must be reversed. It is the duty of this Supreme Court to grant our Petition for a Writ of Certiorari. The Congress obviously had in mind such cases as this when it provided in the law that these matters were subject to review by a Writ of Certiorari by this Court.

The affirmative duty is enjoined upon this Court to analyze these charges and the applicable evidence, and we submit that if that is done under the rules laid down in the statute and in Universal Camera v. NLRB, 340 U. S. 474, this Court is compelled to find that both the Labor Board and the Panel of the Circuit Court gave this record only a superficial examination and did not give it the consideration and attention which the law requires.

CONCLUSION

We recognize that this Reply Brief is long. Yet, because of the circumstances and of the importance of this case and the principles involved herein, it is necessary to reiterate and to set out those parts of the record and evidence which show clearly that the Complaint in the first place was erroneously conceived and should never

have been filed, and that the Trial Examiner and the Board in their zeal actually manufactured a case which does not exist.

We earnestly request this Court to give this case and record the consideration the law requires and that it deserves, because the Circuit Court failed to do it. This Petition for a Writ of Certiorari should be granted, and this whole matter fully presented on full submission.

Respectfully submitted

NEILL GARRETT
STEWART, GARRETT, HEARTNEY,
JONES & WATTS
404 Equitable Building
Des Moines, Iowa 50309
Attorneys for Petitioner